

ISSUED: September 6, 2002

D.T.E. 02-33

Petition of New England Power Company for approval to divest ownership interest in the Seabrook Nuclear Power Station pursuant to G.L. c. 164, § 76 and for findings under § 32(c) of the Public Utility Holding Company Act of 1935.

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## I. INTRODUCTION

On May 17, 2002, New England Power Company (“NEP”) filed a petition with the Department of Telecommunications and Energy (“Department”) for the following: (1) approval of the sale of NEP’s interest in the Seabrook Nuclear Power Station (“Seabrook”), located in Seabrook, New Hampshire, to FPL Energy Seabrook, LLC (“FPLE Seabrook”); and (2) findings regarding the treatment of the divested assets as eligible facilities so that FPLE Seabrook may apply to the Federal Energy Regulatory Commission (“FERC”) for exempt wholesale generator (“EWG”) status under § 32(c) of the Public Utility Holding Company Act of 1935, codified as 15 U.S.C. § 79z-5a (“PUHCA”). The Department docketed this matter as D.T.E. 02-33.

Pursuant to notice duly issued, a public hearing was held on June 12, 2002. The Attorney General of the Commonwealth of Massachusetts (“Attorney General”) filed a notice of intervention as of right pursuant to G.L. c. 12, § 11E. FPLE Seabrook was permitted to intervene as a full party. The Department granted limited participant status to Canal Electric Company (“Canal”), Cambridge Electric Light Company (“Cambridge”), and Commonwealth Electric Company (“Commonwealth”) (collectively, “NSTAR Companies”); Connecticut Light and Power Company (“CL&P”); and to J.P. Morgan Securities, Inc. (“J.P. Morgan”).

Because the petitions of the NSTAR Companies in D.T.E. 02-34<sup>1</sup> and of CL&P in D.T.E. 02-35<sup>2</sup> have issues and facts in common with NEP's petition in this proceeding pertaining to either the approval of the sale or findings under PUHCA, or both, the Department consolidated the evidentiary hearings in all three proceedings as to those two issues for administrative efficiency. The dockets themselves were not consolidated, and the Department issued separate orders in these companion dockets.

The Department conducted a consolidated evidentiary hearing on July 1, 2002.<sup>3</sup> In support of its petition, NEP sponsored the testimony of Terry L. Schwennesen, vice-president and director of generation investments for NEP. NEP also co-sponsored the testimony of Paul M. Dabbar, vice-president of the natural resources group of J.P. Morgan, the auction agent for the proposed sale. NEP, FPLE Seabrook, and the Attorney General filed initial briefs on July 31, 2002. On August 5, 2002, FPLE Seabrook filed a reply brief, and NEP

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<sup>1</sup> The Department approved the NSTAR Companies' petition for approval of the sale of Canal's interest in Seabrook to FPLE Seabrook, for approval to terminate the purchased power agreement between Canal, Cambridge, and Commonwealth, and for findings by the Department regarding the treatment of the Seabrook assets as eligible facilities under § 32(c) of PUHCA. Canal Electric Company, Cambridge Electric Light Company, Commonwealth Electric Company, D.T.E. 02-34 (2002).

<sup>2</sup> The Department approved CL&P's petition for findings by the Department regarding the treatment of the Seabrook assets as eligible facilities under § 32(c) of PUHCA. Connecticut Light & Power Company, D.T.E. 02-35 (2002).

<sup>3</sup> In support of their joint petition in D.T.E. 02-34, the NSTAR Companies sponsored the testimony of Robert H. Martin, director of electric energy supply, asset divestiture, and outsourcing for NSTAR Electric and Gas Corporation. In support of its petition in D.T.E. 02-35, CL&P sponsored the testimony of Donald M. Bishop, manager of regulatory policy-Massachusetts for Northeast Utilities Service Company. The testimony of these witnesses in the July 1, 2002 consolidated evidentiary hearing is part of the record in D.T.E. 02-33.

filed a joint reply brief with the NSTAR Companies. The Attorney General did not file a reply brief. The evidentiary record contains 67 exhibits and ten responses to record requests.<sup>4</sup>

## II. STANDARD OF REVIEW

The Legislature has vested broad authority in the Department to regulate the ownership and operation of electric utilities in the Commonwealth. See, e.g., G.L. c. 164, § 76. The Department's authority was most recently augmented by the Electric Industry Restructuring Act. St. 1997, c. 164 ("Restructuring Act"). Boston Edison Company, D.P.U./D.T.E. 96-23, at 9 (1998). The Restructuring Act requires that each electric company organized under the provisions of G.L. c. 164 file a plan for restructuring its operations to allow for the introduction of retail competition in generation supply. G.L. c. 164, § 1A(a). Among other things, the Restructuring Act requires that all restructuring plans contain a detailed accounting of the company's transition costs and a description of the strategy to mitigate those transition costs. Id. One possible mitigation strategy is the divestiture of a company's generating units. G.L. c. 164, § 1.

In reviewing a company's proposal to divest its generating units, the Department considers the consistency of the proposed transactions with the company's restructuring plan, or in some cases the company's restructuring settlement, and the Restructuring Act. A divestiture transaction will be determined to be consistent with the company's restructuring plan or settlement and the Restructuring Act if the company demonstrates to the Department that the

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<sup>4</sup> Although the documents were entered into evidence in the three dockets separately, the Department allowed documents from D.T.E. 02-34 and D.T.E. 02-35 to be incorporated in the instant proceeding by reference (Tr. 1, at 205).

“sale process is equitable and maximizes the value of the existing generation facilities being sold.” G.L. c. 164, § 1A(b)(1). A sale process will be deemed both equitable and structured to maximize the value of the existing generating facilities being sold, if the company establishes that it used a “competitive auction or sale” that ensured “complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale.” G.L. c. 164, § 1A(b)(2).

### III. SEABROOK DIVESTITURE

#### A. Overview

NEP proposes to divest its generation interest in Seabrook to FPLE (Exh. NEP-2, at 2).<sup>5</sup> This sale is part of a control transaction in which other owners of Seabrook will divest their ownership interests totaling 88.23 percent of the Seabrook assets; the non-selling owners will retain their minority ownership interests.<sup>6</sup> NEP has a 9.95766 percent ownership interest in Seabrook (*id.* at 5). The proposed total purchase price for the sellers’ interests combined is \$836.6 million (*id.* at 13). In addition to acquiring the sellers’ interests in the Seabrook assets, FPLE Seabrook will assume the liabilities associated with each seller’s ownership interest, including, among other things, all on-site environmental liabilities, spent nuclear fuel disposal

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<sup>5</sup> NEP’s interest in Seabrook includes a share of Seabrook Unit 1, an operational 1,161 megawatt nuclear power plant; Seabrook Seabrook Unit 2, a partially constructed unit that is not operational; and nuclear fuel inventories (Exh. NEP-2, at 2, 13).

<sup>6</sup> The selling owners’ interests in Seabrook are as follows: North Atlantic Energy Corporation, 35.98201 percent; CL&P, 4.05985 percent; United Illuminating Company, 17.50000 percent; Great Bay Power Corporation, 12.13240 percent; Little Bay Power Corporation, 2.89989 percent; NEP, 9.95766 percent; Canal, 3.52317 percent; and New Hampshire Electric Cooperative, 2.17391 percent (Exh. NEP-2, at 5).

liabilities, and decommissioning liabilities<sup>7</sup> (Exh. NEP-3, Purchase and Sale Agreement at § 2.3 (“PSA”)).

Seabrook was offered for sale in a public auction conducted under the supervision of the New Hampshire Public Utilities Commission (“NHPUC”) and the Connecticut Department of Public Utility Control (“CTDPUC”) (Exh. NEP-2, at 2).<sup>8</sup> NHPUC and CTDPUC selected J.P. Morgan to conduct the auction<sup>9</sup> under supervision of NHPUC’s Staff and CTDPUC’s Utility Operations and Management Analysis auction team (“UOMA”) (*id.* at 3). J.P. Morgan

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<sup>7</sup> The assets of the seller’s decommissioning fund will be transferred to FPLE Seabrook’s decommissioning fund at the close of the sale (PSA at § 5.10(b)). In the event that FPLE Seabrook or its successors complete decommissioning, and the sellers’ “customer contributions” to the decommissioning fund remain, those customer contributions will be returned to customers to the extent required by the applicable state law, including “all laws, rules, regulations, codes, injunctions, judgments, orders, decrees, rulings, interpretations, constitution, ordinance, common law, or treaty, of any Governmental Authority” (PSA at §§ 5.10(h), 13).

<sup>8</sup> New Hampshire law provides that NHPUC administers the sale of generation assets that are located in New Hampshire. N.H. Rev. Stat. Ann. § 369-B:3(IV)(b)(13); 2001 N.H. Laws 29:15; PSNH Proposed Restructuring Settlement, Order Addressing Motions for Clarification and Rehearing, Amended Settlement Agreement and Financing Issues, Order No. 23,549, N.H.P.U.C. Docket No. DE 99-099 (Sept. 8, 2000). Connecticut law provides that utilities seeking to divest nuclear generation assets must submit a divestiture plan for approval by CTDPUC. Conn. Gen. Stat. § 16-244g. CTDPUC sets a minimum bid price and appoints a consultant to conduct the auction process. *Id.* There are no analogous provisions under Massachusetts law that required the Seabrook auction to be conducted by the Department.

<sup>9</sup> Each selling owner of Seabrook executed a “Participation, Compensation and Indemnity Agreement” acknowledging that NHPUC and CTDPUC selected J.P. Morgan as the financial advisor and auction agent for the sale and limiting the sellers’ participation to providing input during the auction process, accepting or rejecting bids, providing input during the post-bid negotiations, and accepting or rejecting the final negotiated terms (Exh. DTE-NEP-1-7, att. A at 2-6).

was selected through a competitive solicitation process conducted by NHPUC and in coordination with CTDPUC (id. at 3).

B. Auction Process

1. Positions of the Parties

NEP argues that the sellers “used a ‘competitive auction or sale’ that ‘ensured complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale’” (NEP Initial Brief at 7, citing Boston Edison Company and Commonwealth Electric Company, D.T.E. 98-119/126, at 5 (1999), quoting G.L. c. 164, § 1A(b)(2); see also FPLE Seabrook Initial Brief at 5).<sup>10</sup> NEP described the first stage of the auction process as an information-gathering stage, during which J.P. Morgan solicited interest from entities known or believed to be potential bidders based on previous public statements, industry position, or participation in recent sales of nuclear assets (Exh. NEP-2, at 6). According to NEP, J.P. Morgan then distributed an offering memorandum describing the Seabrook assets in detail to potential bidders that J.P. Morgan determined were technically and financially qualified to purchase and operate Seabrook (id.).

NEP explained that during the due diligence phase of the auction, bidders received access to an electronic data room containing the documents that were compiled for the sale process including “frequently asked questions” about Seabrook (id.). NEP states that bidders

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<sup>10</sup> The Attorney General notes that neither the Department nor the Massachusetts selling owners participated in the final negotiations (Attorney General Initial Brief at 3). The Attorney General, however, argues not that the auction process was inequitable, but rather, that the result of the process does not treat Massachusetts consumers fairly (id.).

participated in individual pre-bid meetings with J.P. Morgan and Seabrook management representatives, and were permitted to submit confidential questions, which J.P. Morgan addressed (id. at 7). Bidders were provided an opportunity for a site visit (id.). NEP states that J.P. Morgan prepared and distributed prototype transaction documents upon which all bids were required to be based (id.). NEP states that these prototype transaction documents included a form of purchase and sale agreement, a form of interconnection agreement, and several forms of power purchase agreements (id.).

NEP states that once potential buyers submitted their initial binding bids, J.P. Morgan analyzed the bids to determine which bidders were most likely to enable J.P. Morgan and the Seabrook owners to achieve their objectives (id. at 10). NEP claims that these objectives included meeting all requirements under New Hampshire and Connecticut law; transferring all material assets, entitlements, obligations, and liabilities associated with the Seabrook assets; maximizing opportunities for current Seabrook employees after the sale; and ensuring that the transaction would close in a timely manner (id. at 10-11). NEP further claims that bids were also evaluated based upon an assessment of each bidder's financial, operational, and safety qualifications; the present value of the bid; and the bidder's willingness to accept the material terms of the prototype transaction documents (id. at 11). NEP states that J.P. Morgan presented its bid analysis to the NHPUC Staff, UOMA, and the sellers (id.). NEP states that the sellers then gave their consent to J.P. Morgan to conclude a transaction with the leading bidder (id.). NEP claims that the identity of the leading bidder was not disclosed to the sellers until final negotiations commenced (id. at 13).

NEP states that a negotiating team consisting of NHPUC Staff, UOMA, and J.P. Morgan conducted post-bid negotiations with the leading bidder on proposed changes to the transaction documents (id. at 12). NEP states that the negotiating team reported regularly to, and received input from the sellers (id.). NEP claims that the sellers did not participate in direct negotiations with the leading bidder (Tr. 1, at 122-24). NEP states that when these negotiations were concluded, the sellers had a final opportunity to review and approve the final transaction documents (Exh. NEP-2, at 12). NEP claims that all sellers approved the proposed sale according to the terms set forth in the final PSA (id. at 12-13; Exh. NEP-3).

## 2. Analysis and Findings

In evaluating the divestiture of generation assets, the Department first reviews whether the sale process was equitable and structured to maximize the value of the assets being sold. Western Massachusetts Electric Company, D.T.E. 00-68, at 12 (2000). In making these determinations, the Department considers whether the company used a “competitive auction or sale” that ensured “complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale.” G.L. c. 164, § 1A (b)(2).

The record establishes that the structure of the auction allowed bidders to establish the market value of Seabrook through an open and competitive market test (Exh. NEP-2, 6-7, 9). J.P. Morgan solicited interest from a broad array of potential qualified bidders (Exh. NEP-2, at 6). All interested bidders had equal access to the necessary data and information, thereby facilitating due diligence inquiries (id. at 6-7). Moreover, each bidder was permitted to

participate in meetings and site visits (id. at 7). The only information withheld from the participants during the auction process was the identity of the other bidders (id. at 9). The Department notes that no party has indicated any concern with respect to the management of or access to information. The record demonstrates that the auction process ensured complete, uninhibited, non-discriminatory access to all data and information by all interested bidders and that the auction process was competitive. Therefore, the Department finds that the auction process used was equitable and structured to maximize the value of the assets sold.

C. Maximization of Asset Value

1. Positions of the Parties

a. Attorney General

The Attorney General opposes NEP's petition only on the grounds that Massachusetts customers should receive "the same favorable treatment regarding the sharing of excess decommissioning funds that the customers of the state of New Hampshire . . . receive" (Attorney General Brief at 1).<sup>11</sup> The Attorney General contends that New Hampshire law requires Seabrook owners to "return to New Hampshire customers any excess funds that remain after decommissioning" (Attorney General Brief at 2). The Attorney General argues that the Department should condition the sale upon FPLE Seabrook returning to Massachusetts customers "a share of excess decommissioning funds to Massachusetts customers equal to [the Massachusetts utilities'] ownership share" and that the Department should prohibit any "staged

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<sup>11</sup> The Attorney General does not argue that any other terms of the sale fail to maximize the value obtained for Seabrook.

closings” by the non-Massachusetts sellers omitting the Massachusetts utilities from the sale (id. at 3). The Attorney General asserts that the overall purchase price for Seabrook to be received by all sellers was reduced to compensate for the return of a portion of excess decommissioning funds to New Hampshire consumers alone (id.). Therefore, the Attorney General argues that NEP has not met its requirement to maximize the proceeds from the sale of its generation assets (Attorney General Brief at 3). The Attorney General argues that the PSA does not treat Massachusetts consumers fairly unless they are granted the same treatment as the customers of New Hampshire or Connecticut (id.).

b. NEP

NEP states that the bids were evaluated based on whether the bids were most likely to enable J.P. Morgan and the Seabrook owners to achieve their objectives, which included meeting all requirements under New Hampshire and Connecticut law; transferring all material assets, entitlements, obligations, and liabilities associated with the Seabrook assets; maximizing opportunities for current Seabrook employees after the sale; and ensuring that the transaction would close in a timely manner (Exh. NEP-2, at 10-11). NEP claims that bids were also evaluated based upon an assessment of each bidder’s financial, operational, and safety qualifications; the present value of the bid; and the bidder’s willingness to accept the material terms of the prototype transaction documents (id. at 11). NEP argues that the sale price of \$836.6 million, excluding \$25.6 million attributable to Unit 2, translates into a per unit price of \$792 per kilowatt (“KW”) of capacity purchased for Unit 1 (id. at 19). NEP contends that the \$792 per KW price for Seabrook is one of the highest prices received in a nuclear auction and

exceeds the \$664 per KW price obtained in a nuclear auction for Millstone Units 2 and 3 (NEP Initial Brief at 5). See also D.T.E. 00-68, at 9. NEP argues that “[a] significant factor contributing to the favorable results of the sale for NEP is the premium associated with FPLE Seabrook being able to obtain a controlling ownership interest” (NEP Initial Brief at 5; see also Tr. 1, at 51-52, 54-56, 120).

With regard to the disposition of decommissioning funds, NEP states that the New Hampshire statute specifically referenced in § 5.10(h)(i) of the PSA<sup>12</sup> defines New Hampshire “customer contribution” to the decommissioning fund as “‘the portion of the [F]und contributed by New Hampshire customers of the electric utility, including interest and earnings as of the date of ownership transfer’ as determined by the [New Hampshire Nuclear Decommissioning Finance Committee (“NDFC”)]” (NEP/NSTAR Companies Joint Reply Brief at 3, citing N.H. Rev. Stat. Ann. § 162-F:21-b(II)(c)). NEP argues that in determining excess decommissioning funds, “customer contributions do not include interest and earnings that accrue after the date of

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<sup>12</sup> Specifically, the PSA provides:

- (i) any remaining Decommissioning Funds determined by the [New Hampshire Nuclear Decommissioning Finance Committee] to be New Hampshire customer contributions pursuant to [N.H. Rev. Stat. Ann. § 162-F:21-b(II)(c)], and
- (ii) any remaining Decommissioning Funds determined by the Governmental Authority having jurisdiction in Connecticut, Massachusetts and Rhode Island, as the case may be, to be customer contributions from the customers of such state under the applicable Law of such state, to the extent required by the applicable Law of such state, shall be paid by the Buyer in coordination with applicable Governmental Authority having jurisdiction in such state for the benefit of the customers of the relevant Seller or Sellers in such state.

(PSA at § 5.10(h)).

closing and customer contributions are deemed to be applied first against decommissioning expenses” (NEP/NSTAR Companies Joint Reply Brief at 3). NEP points out that Massachusetts has no comparable statute in effect, but that treatment of excess decommissioning funds with respect to the Massachusetts utilities in accordance with the New Hampshire statute would address objections raised by the Attorney General regarding the disposition of decommissioning funds (id.). NEP argues, however, that requiring more favorable treatment for Massachusetts customers could adversely affect the closing of the transaction (id.).

c. FPLE Seabrook

FPLE Seabrook is in accord with NEP’s position on maximization of asset value, i.e. that the sale will result in a substantial benefit to ratepayers and that the auction maximized asset value in a fair market test (FPLE Seabrook Initial Brief at 7). FPLE Seabrook argues that because NEP’s share is proposed to be sold as part of a bloc that will allow FPLE Seabrook to control the operations of Seabrook, NEP will receive a premium on the value of its share; conversely, FPLE Seabrook argues that if NEP does not sell its interest as part of this control transaction, NEP could only sell at a discount price inherent in selling a minority share (id. at 6).

FPLE Seabrook contends, however, that the Department should reject the Attorney General’s suggestion that NEP’s Massachusetts customers be given a benefit equivalent to that of New Hampshire law (FPLE Seabrook Reply Brief at 6). FPLE Seabrook argues that the Department should not condition its approval of the sale “upon a particular outcome regarding the treatment of excess decommissioning funds or any modification to the terms of the Seabrook

PSA” because the Attorney General has failed to make a “most compelling showing” that the Department should supplant the results of an open market test of asset value with an administrative determination of asset value (id., citing D.T.E. 98-119/126, at 29).

2. Analysis and Findings

The Department has held, pursuant to the Restructuring Act, that the results of a competitive auction are deemed to satisfy the requirement that the sale process maximize the value of the generation facilities being sold. Cambridge Electric Light Company, Commonwealth Electric Company, and Canal Electric Company, D.T.E. 98-78/83, at 3-4 (1998), citing G.L. c. 164, § 1A(b)(1). An open, rational, transparent, and fairly managed auction tests the market for, and the value of, an asset at the time of the offering. Id. at 10. The bid results of such a market test under proven fair conditions are strong evidence of an asset’s worth. Id. at 10-11. Further, the Department has held that, under the Restructuring Act, the bargained-for terms of a transaction achieved through “an open market test [are] a better determinant of asset value than an administrative determination” and that “[o]nly upon the most compelling showing would the Department supplant the results of a market test.” D.T.E. 98-119/126, at 29.

The Attorney General argues that the final PSA does not maximize the value of NEP’s interest in Seabrook because customers of the New Hampshire utilities are accorded more favorable treatment than customers of the Massachusetts utilities with regard to decommissioning funds, and that the Department should place additional conditions on our approval of NEP’s petition, including requiring that Massachusetts customers receive the same

treatment as the customers of New Hampshire or Connecticut (Attorney General Brief at 3).<sup>13</sup>

For the reasons that follow, the Department concludes that to require Massachusetts customers to receive the same protections that New Hampshire customers receive under New Hampshire law is appropriate and is consistent with, and does not supplant, the bargained-for terms of the PSA.

The PSA provides that any remaining decommissioning funds determined by the Department to be Massachusetts customer contributions “under the applicable Law of [Massachusetts], to the extent required by the applicable Law of [Massachusetts]” are to be paid by FPLE Seabrook to the sellers for the benefit of their customers (PSA at § 5.10(h)). The PSA further broadly defines the term “law” to include “all laws, rules, regulations, codes, injunctions, judgments, orders, decrees, rulings, interpretations, constitution, ordinance, common law, or treaty . . .” (PSA at § 13). The Department’s findings in this Order with respect to the disposition of Massachusetts customer contributions fall within the PSA’s broad definition of applicable “law,” and, therefore, are not additional conditions upon the transaction.

Further, the Department may reasonably interpret § 5.10(h) of the PSA to provide that Massachusetts customer contributions, including interest and earnings as of the date of the transfer of the Seabrook assets but not including interest and earnings added to the decommissioning funds after the transfer, must be returned to Massachusetts customers in the

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<sup>13</sup> No party presented arguments regarding the disposition of decommissioning funds under Connecticut law. Therefore, we consider the Attorney General’s argument with respect to New Hampshire law.

same manner as New Hampshire customer contributions are returned, if any such funds remain after decommissioning is completed. See N.H. Rev. Stat. Ann. § 162-F:21-b(II)(c). If the Department does not make such a finding, then the PSA treats Massachusetts customers in an unequal manner, which would be unacceptable.

The Department recognizes, however, that the benefits of the New Hampshire statute are unlikely to materialize. If, for example, all of the selling owners close the sale of their Seabrook interests on December 31, 2002, the Decommissioning Trust Closing Amount will be \$232.72 million (PSA at § 5.10(a) n.1). FPLE Seabrook would have to complete decommissioning for less than \$232.72 million, regardless of inflation, in order for customers to receive a refund of their portion of customer contributions. Although the record demonstrates that the ultimate cost of decommissioning is highly volatile, the future cost of decommissioning in the year 2026 was forecast to be \$1,626,839,659 (Tr. 1, at 49, 57; Exh. DTE-NSTAR-1-22, att. 1, at 2). Thus, FPLE Seabrook would have to achieve a remarkable reduction in decommissioning costs before the contingent benefits of the New Hampshire statute would even materialize. Nevertheless, unless the Department finds that Massachusetts customer contributions must be refunded in the same manner as New Hampshire customer contributions, Massachusetts customers are treated in an unequal manner under the PSA. Although customers in both New Hampshire and in Massachusetts are unlikely to receive any refund of customer contributions when decommissioning is actually completed, the contingent claim itself has a positive value that Massachusetts customers otherwise would not receive.

As a matter of comity, any state regulatory body that oversees a transaction affecting utilities in multiple jurisdictions has an obligation to treat all participants fairly. There is no evidence in the record that either J.P. Morgan, NHPUC Staff, or UOMA acted in bad faith in negotiating the terms of § 5.10(h). To the contrary, the record demonstrates that J.P. Morgan negotiated on behalf of the non-New Hampshire selling owners adding the language in § 5.10(h)(ii) to make the treatment of excess customer contributions “equally applicable across all states” (Tr. 1, at 34-35). Therefore, we conclude that applying equal treatment to all customers was the just and intended result.

Aside from the issue of the disposition of customer contributions to the decommissioning fund, the record demonstrates that the proposed sale of the sellers’ interests to FPLE Seabrook for \$836.6 million was the negotiated result of the highest bid in the Seabrook competitive auction (Exh. AG-NEP-1-15 [CONFIDENTIAL]). Further, the \$792 per KW price is one of the highest prices achieved in a nuclear auction and is higher than the value approved by the Department for the sale of Millstone Units 2 and 3 at \$664 per KW. See D.T.E. 00-68, at 9.

Accordingly, the Department finds that the proposed sale will maximize the value of the Seabrook asset price under the following condition. If decommissioning is completed at a cost that is less than the Decommissioning Trust Closing Amount as defined in § 5.10(a) of the PSA, as of the date of the transfer of ownership and not to include any interest or earnings that may subsequently accrue on the Decommissioning Trust Closing Amount, then the pro rata portion of the amount remaining that was contributed by NEP’s Massachusetts customers shall

be refunded by FPLE Seabrook to Massachusetts Electric Company (“MECo”)<sup>14</sup> for the benefit of its retail customers. We note that the Decommissioning Trust Closing Amount will not be known until the transactions contemplated in the PSA are completed. Therefore, we direct NEP and FPLE Seabrook to file a joint statement of the Decommissioning Trust Closing Amount and a statement of the amount contributed by Massachusetts customers through NEP within thirty days of the completion of the Initial Closing and all Subsequent Closings, as referenced in § 5.10(a) of the PSA.<sup>15</sup>

D. Consistency with Company’s Restructuring Settlement and Restructuring Act

The Department has held that a divestiture transaction will be determined to be consistent with a company’s restructuring plan or settlement agreement if the company demonstrates to the Department that the “sale process is equitable and maximizes the value of the existing facilities being sold.” D.T.E. 00-68, at 3; D.T.E. 98-119/126, at 4-5. MECo’s

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<sup>14</sup> The Department notes that NEP and Massachusetts Electric Company (“MECo”) were subsidiaries of New England Electric System, now National Grid. Prior to electric utility restructuring, MECo was a retail subsidiary that operated in Massachusetts under an all-requirements contract with NEP, a wholesale subsidiary. MECo’s customers paid a decommissioning surcharge that was passed through NEP into the decommissioning fund. Therefore, any excess customer contributions paid by Massachusetts customers through MECo to NEP should be refunded directly to MECo for the benefit of Massachusetts customers, rather than to NEP.

<sup>15</sup> Because our findings that Massachusetts customer contributions should be treated in the same manner as New Hampshire customer contributions are within the terms of approvals required under the PSA, the Department need not rule on the Attorney General’s argument that the Department should prohibit non-Massachusetts utilities from closing the sale of their interests without the Massachusetts utilities (Attorney General Brief at 12). Moreover, the Attorney General cites no statute or precedent in support of enjoining the sale of generation interests by non-Massachusetts utilities over which the Department does not assert jurisdiction.

restructuring settlement specifically provides for the divestiture of its interest in Seabrook.

Massachusetts Electric Company and Nantucket Electric Company, D.P.U./D.T.E. 96-25-A at 9 (1997); see also Exh. NEP-1, at 5. Because the Department has found that the sale process is equitable and structured to maximize value, and because the value of Seabrook has been maximized subject to our findings regarding the disposition of decommissioning funds, the Department finds that the Seabrook divestiture is consistent with the MECo's restructuring settlement and consistent with the Restructuring Act.

#### IV. DESIGNATION OF SEABROOK AS AN ELIGIBLE FACILITY

NEP also has requested that the Department make findings necessary for the Seabrook assets to be declared "eligible facilities" under PUHCA, so that FPLE Seabrook can seek a determination from FERC that acquiring the divested assets qualifies it to be an EWG under § 32 of PUHCA. That section defines an EWG to be a person "exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale." 15 U.S.C. § 79z-5a(a)(1). An eligible facility is one "used for the generation of electric energy exclusively for sale at wholesale." 15 U.S.C. § 79z-5a(a)(2). With respect to a facility already under construction or operating on the date of the enactment of § 32 and already covered in state rates or charges for electric energy sold directly to customers, specific findings from the Department are required before such facility may become an eligible facility. These required findings are "that allowing such facility to be an eligible facility (1) will benefit consumers, (2) is in the public interest, and (3) does not violate State law . . . ." 15 U.S.C. § 79z-5a(c).

According to NEP, obtaining EWG status for FPLE Seabrook is a condition precedent to the sale and that without this status, the Seabrook assets would be “virtually unmarketable” (Exh. NEP-1, at 12; Tr. 1, at 117). Therefore, if FPLE Seabrook does not obtain EWG status, then Massachusetts customers will lose the benefit of the sale. The record demonstrates that the sale will result in a \$1.26 per month reduction in the year 2003 on a typical 500 kilowatt-hour residential customer’s bill from MECo, or a 2.28 percent decrease in the bill (Exh. TLS-1, Supp. 1). Therefore, the Department finds that treating the Seabrook assets as an eligible facility will benefit consumers. Further, because the Department finds that the sale is consistent with MECo’s restructuring settlement and consistent with the Restructuring Act, treating the Seabrook assets as an eligible facility will be in the public interest. Finally, because the proposed sale of Seabrook to an exempt wholesale generator is consistent with MECo’s restructuring settlement and with the Restructuring Act’s goal of “an expedient and orderly transition from regulation to competition in the generation sector,” the Department finds that treating the Seabrook assets as an eligible facility does not violate State law. St. 1997, c. 164, § 1(m); see generally G.L. c. 164.

V. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the Petition of New England Power Company for approval of the sale of its interest in the Seabrook Nuclear Power Station, located in Seabrook, New Hampshire, to FPL Energy Seabrook, LLC is APPROVED consistent with the findings and directives contained in this Order; and it is

FURTHER ORDERED: That within thirty (30) days after the Decommissioning Trust Closing Amount is fixed after the Initial Closing and each Subsequent Closing is completed, as referenced in § 5.10(a) of the Purchase and Sale Agreement, New England Power Company and FPLE Seabrook shall jointly file with the Department a statement of the Decommissioning Trust Closing Amount and a statement of the total Massachusetts customer contributions that were contributed to the amount through New England Power Company consistent with the findings and directives contained in this Order; and it is

FURTHER ORDERED: That the Petition of New England Power Company for findings that the treatment of the Seabrook assets as “eligible facilities” pursuant to the Public Utilities Holding Company Act will benefit consumers, is in the public interest, and does not violate State law is APPROVED consistent with the findings and directives contained in this Order.

By Order of the Department,

\_\_\_\_\_/s\_\_\_\_\_  
Paul B. Vasington, Chairman

\_\_\_\_\_/s\_\_\_\_\_  
James Connelly, Commissioner

\_\_\_\_\_/s\_\_\_\_\_  
W. Robert Keating, Commissioner

\_\_\_\_\_/s\_\_\_\_\_  
Eugene J. Sullivan, Jr., Commissioner

\_\_\_\_\_/s\_\_\_\_\_  
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).